

In the Matter of )  
 )  
Petition for Declaratory Ruling of ) WC Docket No. 14-52  
Mediacom Communications Corporation )  
Pursuant to Section 1.2(a) of the )  
Commission's Rules )

CenterPoint Energy Houston Electric, LLC (“CenterPoint”), through counsel, and pursuant to the April 8, 2014 Public Notice issued in the above-captioned proceeding,<sup>1</sup> concurs with, and supports the initial comments submitted by electric utilities nationwide,<sup>2</sup> and respectfully requests that the Commission dismiss the Petition for Declaratory Ruling of Mediacom Communications Corporation (“Mediacom”), or deny the sweeping relief that Mediacom demands. The question of whether the specific indemnification obligations negotiated between Mediacom’s subsidiary, MCC Iowa, LLC, and Interstate Power and Light/Wisconsin Power and Light are “just and reasonable”, in accordance with Section 224 (b)(1) of the Act,<sup>3</sup> must be determined through the pole attachment

<sup>3</sup> 47 U.S.C. § 224 (b)(1).

complaint process,<sup>4</sup> upon complete consideration of applicable state law, facts and circumstances impacting the parties' negotiations, and other risk allocating provisions agreed upon by the parties. Neither Mediacom, nor the supporters of Mediacom's Petition, have presented any justification for the Commission's broad declaration that *all* asymmetrical indemnification clauses are in violation of the Act, and hence, are unenforceable.

CenterPoint is the electric transmission and distribution unit of CenterPoint Energy, Inc., serving more than 2.2 million customers, within a five thousand square mile area of southeastern Texas, including the city of Houston. CenterPoint owns, operates and maintains a network of poles, wires and substations that deliver electric power from power plants to customers, on behalf of eighty-five (85) retail electric providers, over nearly 50,000 miles of distribution lines. CenterPoint currently maintains pole attachment agreements with nearly forty (40) jurisdictional entities, which include varying indemnification obligations reflecting Texas state law, as well as specific resolutions reached through negotiations with individual counterparties.

The initial comments submitted by the Electric Utilities underscore that the Enforcement Bureau's case-specific adjudication of those indemnification obligations alleged by Mediacom to be unjust and unreasonable is consistent with well-settled Commission precedent, as well as the longstanding preference for negotiated pole attachment agreements repeatedly articulated in the Commission's orders implementing Section 224 of the Act. In *Marcus Cable Associates, LP v. Texas Utilities. Elec. Co.*, the Commission appropriately declined to endorse a bright-line ruling similar to that demanded by Mediacom, that would have invalidated indemnification provisions set forth in pole attachment agreements that were not under review.<sup>5</sup> Moreover, contrary to the

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<sup>4</sup> See C.F.R. § 1404.

<sup>5</sup> *Marcus Cable Associates, LP v. Texas Utilities. Elec. Co* (File No. 96-002) FCC 03-173, 18 FCC Rcd 15932 (rel. Jul. 28, 2003) at ¶ 18 (concluding that the Cable Bureau erred in issuing a declaratory ruling on the basis of an insufficient record to warrant a determination applicable to agreements not before the Commission.).



assertions of Mediacom, and supporters of Mediacom's Petition, the decision of the Enforcement Bureau in *Cable Television Ass'n of Georgia v. Georgia Power Co.*, did not purport to render a general pronouncement as to the reasonableness of all asymmetrical indemnification provisions, but rather addressed the particular indemnification obligations sought to be imposed by Georgia Power.<sup>6</sup> The Commission has long encouraged electric utilities and communications entities to negotiate pole attachment agreements in good faith, and to pursue bargained-for resolutions and exchanges that the parties deem mutually beneficial.<sup>7</sup> Therefore, the Commission must consider, at a minimum, whether specific asymmetric indemnification provisions, such as those challenged by Mediacom's Petition, reflect a *quid pro quo* that should not be disturbed.<sup>8</sup>

The Mediacom Petitions fails to demonstrate that a sweeping prohibition of asymmetrical indemnification obligations between electric utilities and pole licensees would advance the goals of Section 224 of the Act, the Commission's pole attachment regulations or policies, or any other policies of the Commission. Notwithstanding claims of PCIA, and those cable television service providers supporting the Mediacom Petition, the Commission never has endorsed expedited pole

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<sup>6</sup> *Cable Television Ass'n of Georgia v. Georgia Power Co.* (File No. 01-002) DA 03-2613, 18 FCC Rcd 16333 (rel. Aug. 7, 2003) at ¶ 31. Significantly, in rejecting asymmetrical indemnification obligations imposed on the Cable Operators by Georgia Power, the Enforcement Bureau noted that the complainant, Cable Operators, "...do not contend that indemnification provisions generally are unreasonable...[but instead] **claim these particular provisions are unreasonable.**" (emphasis added).

<sup>7</sup> *In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245), *A National Broadband Plan for Our Future* (GC Docket No. 09-51), Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, FCC 11-50 (rel. Apr. 7, 2011) at ¶ 123 ("2011 Pole Attachment Order") ("...we affirm, pursuant to our authority under section 224(b) of the Act, that both attachers and utilities have a duty to negotiate the rates, terms and conditions of attachment in good faith."); *In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245), *A National Broadband Plan for Our Future* (GC Docket No. 09-51), Order and Further Notice of Proposed Rulemaking, FCC 10-84, 25 FCC Rcd 11864 ("2010 Pole Attachment Order") at ¶ 107 ("...we encourage, support and fully expect that mutually beneficial exchanges will take place between utility and attachment entity...[and] want to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues."); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments* (CS Docket No. 97-151), Report and Order, FCC 98-20, 13 FCC Rcd 6777 at ¶ 11 ("...the Commission's role is limited to circumstances when the parties fail to resolve a dispute and...negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved.").

<sup>8</sup> *2010 Pole Attachment Order* at ¶ 106 ("Where a *quid pro quo* is established, the Commission will not disturb the bargained-for package of provisions.").

access at the expense of negotiated solutions.<sup>9</sup> In fact, the Commission reiterated, in the context of its most recent rulemaking, its objective to “encourage, support...and promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested issues.”<sup>10</sup> In its *2011 Pole Attachment Order*, the Commission squarely addressed the concerns raised by supporters of Mediacom Petition’s, concluding that retention of the “sign and sue” rule adequately protects the interests of any pole licensee that is ostensibly forced to accept unjust or unreasonable pole attachment terms or conditions in order to gain timely access to poles.<sup>11</sup>

Of further importance, the initial comments submitted by the Electric Utilities demonstrate that asymmetrical indemnification obligations are permissible under state contract law principles, and in most cases, are significantly impacted by state laws and policies governing fault allocation, workers’ compensation, and insurance.<sup>12</sup> Indeed, of the states that preempted the Commission’s pole attachment jurisdiction, only three (3) have addressed the indemnification obligations of pole licensees – and of those states, *none* has required that such obligations be reciprocal, or symmetric to those of electric utilities.<sup>13</sup> Because questions of contractual indemnification are not within the jurisdiction or expertise of the Commission, and do not impinge on the rights of communications entities to access poles, the Commission must avoid any broad declaration that would undermine varying state legal frameworks, as reflected in negotiated pole attachment agreement provisions.

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<sup>9</sup> See *infra* n. 7.

<sup>10</sup> *Id.*

<sup>11</sup> *2011 Pole Attachment Order* at ¶123.

<sup>12</sup> See Initial Comments of the Dayton Power and Light Company and Indianapolis Power & Light Company at 2; Comments of Oncor Electric Delivery, Ameren Corporation, and Westar Energy in Response to Petition for Declaratory Ruling at 5-7; Comments of Southern Company and Duke Energy in Response to Petition for Declaratory Ruling at 6-16; and Comments of the Utilities Telecom Council at 2-3.

<sup>13</sup> Comments of Southern Company and Duke Energy in Response to Petition for Declaratory Ruling at 18-21

For the reasons set forth herein, and in the initial comments of UTC, and the Electric Utilities, CenterPoint respectfully requests that the Commission dismiss Mediacom's Petition for Declaratory Ruling, or otherwise deny the relief that Mediacom demands.

Respectfully submitted,

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